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### § 242.100 Preliminary note; definitions.

(a) *Preliminary note:* Any transaction or series of transactions, whether or

not effected pursuant to the provisions of Regulation M (§§ 242.100–242.105 of this chapter), remain subject to the antifraud and antimanipulation provisions of the securities laws, including, without limitation, Section 17(a) of the Securities Act of 1933 [15 U.S.C. 77q(a)] and Sections 9, 10(b), and 15(c) of the Securities Exchange Act of 1934 [15 U.S.C. 78i, 78j(b), and 78o(c)].

(b) For purposes of regulation M (§§ 242.100 through 242.105 of this chapter) the following definitions shall apply:

*ADTV* means the worldwide average daily trading volume during the two full calendar months immediately preceding, or any 60 consecutive calendar days ending within the 10 calendar days preceding, the filing of the registration statement; or, if there is no registration statement or if the distribution involves the sale of securities on a delayed basis pursuant to § 230.415 of this chapter, two full calendar months immediately preceding, or any consecutive 60 calendar days ending within the 10 calendar days preceding, the determination of the offering price.

*Affiliated purchaser* means:

(1) A person acting, directly or indirectly, in concert with a distribution

participant, issuer, or selling security holder in connection with the acquisition or distribution of any covered security; or

(2) An affiliate, which may be a separately identifiable department or division of a distribution participant, issuer, or selling security holder, that, directly or indirectly, controls the purchases of any covered security by a distribution participant, issuer, or selling security holder, whose purchases are controlled by any such person, or whose purchases are under common control with any such person; or

(3) An affiliate, which may be a separately identifiable department or division of a distribution participant, issuer, or selling security holder, that regularly purchases securities for its own account or for the account of others, or that recommends or exercises investment discretion with respect to the purchase or sale of securities; *Provided, however*, That this paragraph (3) shall not apply to such affiliate if the following conditions are satisfied:

(i) The distribution participant, issuer, or selling security holder:

(A) Maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of §§ 242.101, 242.102, and 242.104; and

(B) Obtains an annual, independent assessment of the operation of such policies and procedures; and

(ii) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the distribution participant, issuer, or selling security holder that direct, effect, or recommend transactions in securities; and

(iii) The affiliate does not, during the applicable restricted period, act as a market maker (other than as a specialist in compliance with the rules of a national securities exchange), or engage, as a broker or a dealer, in solicited transactions or proprietary trading, in covered securities.

*Agent independent of the issuer* means a trustee or other person who is independent of the issuer. The agent shall be deemed to be independent of the issuer only if:

(1) The agent is not an affiliate of the issuer; and

(2) Neither the issuer nor any affiliate of the issuer exercises any direct or indirect control or influence over the prices or amounts of the securities to be purchased, the timing of, or the manner in which, the securities are to be purchased, or the selection of a broker or dealer (other than the independent agent itself) through which purchases may be executed; *Provided, however*, That the issuer or its affiliate will not be deemed to have such control or influence solely because it revises not more than once in any three-month period the source of the shares to fund the plan the basis for determining the amount of its contributions to a plan, or the basis for determining the frequency of its allocations to a plan, or any formula specified in a plan that determines the amount or timing of securities to be purchased by the agent.

*Asset-backed security* has the meaning contained in General Instruction I.B.5. to Form S-3 (§239.13 of this chapter).

*At-the-market offering* means an offering of securities at other than a fixed price.

*Business day* refers to a 24 hour period determined with reference to the principal market for the securities to be distributed, and that includes a complete trading session for that market.

*Completion of participation in a distribution.* Securities acquired in the distribution for investment by any person participating in a distribution, or any affiliated purchaser of such person, shall be deemed to be distributed. A person shall be deemed to have completed its participation in a distribution as follows:

(1) An issuer or selling security holder, when the distribution is completed;

(2) An underwriter, when such person's participation has been distributed, including all other securities of the same class that are acquired in connection with the distribution, and any stabilization arrangements and trading restrictions in connection with the distribution have been terminated; *Provided, however*, That an underwriter's participation will not be deemed to have been completed if a

syndicate overallocation option is exercised in an amount that exceeds the net syndicate short position at the time of such exercise; and

(3) Any other person participating in the distribution, when such person's participation has been distributed.

*Covered security* means any security that is the subject of a distribution, or any reference security.

*Current exchange rate* means the current rate of exchange between two currencies, which is obtained from at least one independent entity that provides or disseminates foreign exchange quotations in the ordinary course of its business.

*Distribution* means an offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods.

*Distribution participant* means an underwriter, prospective underwriter, broker, dealer, or other person who has agreed to participate or is participating in a distribution.

*Electronic communications network* has the meaning contained in § 240.11Ac1-1(a)(8) of this chapter.

*Employee* has the meaning contained in Form S-8 (§ 239.16b of this chapter) relating to employee benefit plans.

*Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

*Independent bid* means a bid by a person who is not a distribution participant, issuer, selling security holder, or affiliated purchaser.

*NASD* means the National Association of Securities Dealers, Inc. or any of its subsidiaries.

*Nasdaq* means the Nasdaq system as defined in § 240.11Ac1-2(a)(3) of this chapter.

*Nasdaq security* means a security that is authorized for quotation on Nasdaq, and such authorization is not suspended, terminated, or prohibited.

*Net purchases* means the amount by which a passive market maker's purchases exceed its sales.

*Offering price* means the price at which the security is to be or is being distributed.

*Passive market maker* means a market maker that effects bids or purchases in accordance with the provisions of § 242.103.

*Penalty bid* means an arrangement that permits the managing underwriter to reclaim a selling concession from a syndicate member in connection with an offering when the securities originally sold by the syndicate member are purchased in syndicate covering transactions.

*Plan* means any bonus, profit-sharing, pension, retirement, thrift, savings, incentive, stock purchase, stock option, stock ownership, stock appreciation, dividend reinvestment, or similar plan; or any dividend or interest reinvestment plan or employee benefit plan as defined in § 230.405 of this chapter.

*Principal market* means the single securities market with the largest aggregate reported trading volume for the class of securities during the 12 full calendar months immediately preceding the filing of the registration statement; or, if there is no registration statement or if the distribution involves the sale of securities on a delayed basis pursuant to § 230.415 of this chapter, during the 12 full calendar months immediately preceding the determination of the offering price. For the purpose of determining the aggregate trading volume in a security, the trading volume of depositary shares representing such security shall be included, and shall be multiplied by the multiple or fraction of the security represented by the depositary share. For purposes of this paragraph, depositary share means a security, evidenced by a depositary receipt, that represents another security, or a multiple or fraction thereof, deposited with a depositary.

*Prospective underwriter* means a person:

(1) Who has submitted a bid to the issuer or selling security holder, and who knows or is reasonably certain that such bid will be accepted, whether or not the terms and conditions of the underwriting have been agreed upon; or

(2) Who has reached, or is reasonably certain to reach, an understanding with the issuer or selling security holder, or managing underwriter that such

person will become an underwriter, whether or not the terms and conditions of the underwriting have been agreed upon.

*Public float value* shall be determined in the manner set forth on the front page of Form 10-K (§249.310 of this chapter), even if the issuer of such securities is not required to file Form 10-K, relating to the aggregate market value of common equity securities held by non-affiliates of the issuer.

*Reference period* means the two full calendar months immediately preceding the filing of the registration statement or, if there is no registration statement or if the distribution involves the sale of securities on a delayed basis pursuant to §230.415 of this chapter, the two full calendar months immediately preceding the determination of the offering price.

*Reference security* means a security into which a security that is the subject of a distribution (“subject security”) may be converted, exchanged, or exercised or which, under the terms of the subject security, may in whole or in significant part determine the value of the subject security.

*Restricted period* means:

(1) For any security with an ADTV value of \$100,000 or more of an issuer whose common equity securities have a public float value of \$25 million or more, the period beginning on the later of one business day prior to the determination of the offering price or such time that a person becomes a distribution participant, and ending upon such person's completion of participation in the distribution; and

(2) For all other securities, the period beginning on the later of five business days prior to the determination of the offering price or such time that a person becomes a distribution participant, and ending upon such person's completion of participation in the distribution.

(3) In the case of a distribution involving a merger, acquisition, or exchange offer, the period beginning on the day proxy solicitation or offering materials are first disseminated to security holders, and ending upon the completion of the distribution.

*Securities Act* means the Securities Act of 1933 (15 U.S.C. 77a *et seq.*).

*Selling security holder* means any person on whose behalf a distribution is made, other than an issuer.

*Stabilize or stabilizing* means the placing of any bid, or the effecting of any purchase, for the purpose of pegging, fixing, or maintaining the price of a security.

*Syndicate covering transaction* means the placing of any bid or the effecting of any purchase on behalf of the sole distributor or the underwriting syndicate or group to reduce a short position created in connection with the offering.

*30% ADTV limitation* means 30 percent of the market maker's ADTV in a covered security during the reference period, as obtained from the NASD.

*Underwriter* means a person who has agreed with an issuer or selling security holder:

- (1) To purchase securities for distribution; or
- (2) To distribute securities for or on behalf of such issuer or selling security holder; or
- (3) To manage or supervise a distribution of securities for or on behalf of such issuer or selling security holder.

[62 FR 544, Jan. 3, 1997, as amended at 62 FR 11323, Mar. 12, 1997]

#### § 242.101 Activities by distribution participants.

(a) *Unlawful Activity.* In connection with a distribution of securities, it shall be unlawful for a distribution participant or an affiliated purchaser of such person, directly or indirectly, to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period; *Provided, however,* That if a distribution participant or affiliated purchaser is the issuer or selling security holder of the securities subject to the distribution, such person shall be subject to the provisions of §242.102, rather than this section.

(b) *Excepted Activity.* The following activities shall not be prohibited by paragraph (a) of this section:

- (1) *Research.* The publication or dissemination of any information, opinion, or recommendation, if the conditions of §§ 230.138 or 230.139 of this chapter are met; or